

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JUDI L. NICON-ORCUTT,

Plaintiff,

vs.

FOREMOST INSURANCE COMPANY
GRAND RAPIDS, MICHIGAN a/k/a and
d/b/a FOREMOST INSURANCE
COMPANY and FOREMOST INSURANCE
COMPANY,

Defendants.

No. 2:15-cv-00343-MJP

**FOREMOST INSURANCE COMPANY
GRAND RAPIDS, MICHIGAN'S
AMENDED ANSWER, AFFIRMATIVE
DEFENSES AND COUNTERCLAIM**

COMES NOW, Defendant Foremost Insurance Company Grand Rapids, Michigan
(hereinafter "Foremost"), and answers Plaintiff's Complaint as follows:

FIRST CAUSE OF ACTION

Parties/Insurance Contract

1. In answer to paragraph 1 of Plaintiff's Complaint, Foremost admits that Plaintiff was a resident of Whatcom County, Washington at the time of this loss. Foremost is without sufficient information to admit or deny the remaining allegations in this paragraph and therefore denies the same.

1 2. In answer to paragraph 2 of Plaintiff's Complaint, Foremost Insurance Company
2 Grand Rapids, Michigan admits that it is licensed to conduct business in Washington.
3 Foremost admits that it issued policy number 103-0685059723 to Plaintiff. The policy provides
4 coverage pursuant to its terms and conditions and not otherwise. "Foremost Insurance
5 Company" is a trade name and is not an insuring entity. The entity did not issue any policies of
6 insurance. Foremost denies any and all remaining allegations.

7 3. In answer to paragraph 3 of Plaintiff's Complaint, Foremost admits the allegations
8 contained therein.

9 4. In answer to paragraph 4 of Plaintiff's Complaint, Foremost admits that employees,
10 agents or other representatives were authorized to act on behalf of Foremost. Foremost denies
11 any and all remaining allegations.

12 5. In answer to paragraph 5 of Plaintiff's Complaint, Foremost admits that it issued
13 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
14 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
15 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
16 contained in paragraph 5 of Plaintiff's Complaint.

17 6. In answer to paragraph 6 of Plaintiff's Complaint, Foremost admits that it issued
18 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
19 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
20 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
21 contained in paragraph 6 of Plaintiff's Complaint.

22 7. In answer to paragraph 7 of Plaintiff's Complaint, Foremost admits that it issued
23 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,

1 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
2 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
3 contained in paragraph 7 of Plaintiff's Complaint.

4 8. In answer to paragraph 8 of Plaintiff's Complaint, Foremost admits that it issued
5 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
6 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
7 terms and conditions and not otherwise. Foremost further admits that the policy is a contract
8 between Foremost and the Plaintiff. Foremost denies each and every remaining allegation
9 contained in paragraph 8 of Plaintiff's Complaint.

10 9. In answer to paragraph 9 of Plaintiff's Complaint, Foremost admits that it issued
11 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
12 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
13 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
14 contained in paragraph 9 of Plaintiff's Complaint.

15 10. In answer to paragraph 10 of Plaintiff's Complaint, Foremost admits that it issued
16 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
17 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
18 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
19 contained in paragraph 10 of Plaintiff's Complaint.

20 11. In answer to paragraph 11 of Plaintiff's Complaint, Foremost admits that it issued
21 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
22 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
23

1 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
2 contained in paragraph 11 of Plaintiff's Complaint.

3 12. In answer to paragraph 12 of Plaintiff's Complaint, Foremost admits that it issued
4 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
5 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
6 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
7 contained in paragraph 12 of Plaintiff's Complaint.

8 13. In answer to paragraph 13 of Plaintiff's Complaint, Foremost admits that it issued
9 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
10 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
11 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
12 contained in paragraph 13 of Plaintiff's Complaint.

13 14. In answer to paragraph 14 of Plaintiff's Complaint, Foremost admits that it issued
14 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
15 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
16 terms and conditions and not otherwise. Foremost denies each and every remaining allegation
17 contained in paragraph 14 of Plaintiff's Complaint.

18 Background & Events

19 15. In answer to paragraph 15 of Plaintiff's Complaint, Foremost admits that a fire
20 occurred at the manufactured home located at 8590 Ginkgo Drive, Maple Falls, Whatcom
21 County, Washington. Foremost is without sufficient information to admit or deny the
22 remaining allegations in this paragraph and therefore denies the same.
23

1 16. In answer to paragraph 16 of Plaintiff's Complaint, Foremost is without sufficient
2 information to admit or deny the remaining allegations in this paragraph and therefore denies
3 the same.

4 17. In answer to paragraph 17 of Plaintiff's Complaint, Foremost admits that a fire
5 occurred in the early hours of November 11, 2013. Foremost admits that the dwelling and
6 attached deck was a total loss. As to any and all remaining allegations, Foremost is without
7 sufficient information to admit or deny the remaining allegations in this paragraph and
8 therefore denies the same.

9 18. In answer to paragraph 18 of Plaintiff's Complaint, Foremost denies each and every
10 allegation therein.

11 19. In answer to paragraph 19 of Plaintiff's Complaint, Foremost admits that damage
12 occurred to Plaintiff's personal property. As to any and all remaining allegations, Foremost is
13 without sufficient information to admit or deny the remaining allegations in this paragraph and
14 therefore denies the same.

15 20. In answer to paragraph 20 of Plaintiff's Complaint, Foremost admits that the
16 Whatcom County Fire Marshall conducted an investigation with regard to the loss. The results
17 of any said investigation speak for themselves. Foremost denies each and every remaining
18 allegation therein.

19 21. In answer to paragraph 21 of Plaintiff's Complaint, Foremost admits that it retained
20 Q Global to conduct an investigation into the fire. Foremost further admits that Q Global
21 conducted an interview of the Plaintiff. As to each and every remaining allegation therein,
22 Foremost is without sufficient information to admit or deny and therefore denies.
23

1 22. In answer to paragraph 22 of Plaintiff's Complaint, Foremost admits that Q Global
2 prepared a report with regard to the loss. Foremost admits that the report speaks for itself.
3 Foremost denies each and every remaining allegation therein.

4 23. In answer to paragraph 23 of Plaintiff's Complaint, Foremost admits that it
5 investigated the claim including conducting an interview of the Plaintiff. As to each and every
6 remaining allegation therein, Foremost denies.

7 24. In answer to paragraph 24 of Plaintiff's Complaint, Foremost admits that it made an
8 initial payment of \$5,000.00 for the loss of personal property. Foremost admits that it
9 investigated the claim and conducted the examination under oath of the Plaintiff on March 27,
10 2014. As to each and every remaining allegation therein, Foremost denies.

11 25. In answer to paragraph 25 of Plaintiff's Complaint, Foremost admits that it
12 conducted an investigation into the subject claim. As to each and every remaining allegation
13 therein, Foremost denies.

14 26. In answer to paragraph 26 of Plaintiff's Complaint, Foremost admits that it
15 requested the Plaintiff's cell phone records. Foremost further admits that the Plaintiff signed
16 an authorization form to allow Foremost to directly request her cell phone records. As to each
17 and every remaining allegation therein, Foremost denies.

18 27. In answer to paragraph 27 of Plaintiff's Complaint, Foremost admits that the
19 Plaintiff requested additional living expense coverage. In response Foremost paid the full
20 Additional Living Expense limits available under the policy. Foremost denies each and every
21 remaining allegation therein.

22 28. In answer to paragraph 28 of Plaintiff's Complaint, Foremost denies each and every
23 allegation therein.

1 29. In answer to paragraph 29 of Plaintiff's Complaint, Foremost admits that the
2 dwelling was a total loss. Foremost also admits it has extended coverage and has paid for the
3 same amounts under the terms of the subject policy. Foremost has also paid the full contents
4 limits available under the policy. Foremost denies each and every remaining allegation therein.

5 30. In answer to paragraph 30 of Plaintiff's Complaint, Foremost denies each and every
6 allegation therein.

7 31. In answer to paragraph 31 of Plaintiff's Complaint, Foremost admits that the deck
8 attached to the residence was a total loss. This deck was, however, attached to the main
9 building. Foremost denies each and every remaining allegation therein.

10 32. In answer to paragraph 32 of Plaintiff's Complaint, Foremost admits that it issued
11 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
12 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
13 terms and conditions and not otherwise. By way of further answer, Plaintiff has not incurred
14 any expenses associated with debris removal or structure repairs. Foremost denies each and
15 every remaining allegation contained in paragraph 32 of Plaintiff's Complaint.

16 33. In answer to paragraph 33 of Plaintiff's Complaint, Foremost denies each and every
17 allegation therein.

18 34. In answer to paragraph 34 of Plaintiff's Complaint, Foremost admits that it issued
19 Policy No. 103-0685059723 for policy period of December 28, 2012, through December 28,
20 2013, to Judi Nikon-Orcutt as the Named Insured. The policy provides coverage pursuant to its
21 terms and conditions and not otherwise. Foremost admits that it fully paid the Plaintiff's
22 additional living expense claim up to the limit of the policy. Foremost denies each and every
23 remaining allegation contained in paragraph 34 of Plaintiff's Complaint.

1 35. In answer to paragraph 35 of Plaintiff's Complaint, Foremost is without sufficient
2 information to admit or deny and therefore denies.

3 36. In answer to paragraph 36 of Plaintiff's Complaint, Foremost is without sufficient
4 information to admit or deny any allegations with regard to the Plaintiff's mortgage holders and
5 foreclosure and therefore denies. Foremost denies each and every remaining allegation therein.

6 37. In answer to paragraph 37 of Plaintiff's Complaint, Foremost denies each and every
7 allegation therein.

8 38. In answer to paragraph 38 of Plaintiff's Complaint, Foremost is without sufficient
9 information to admit or deny and therefore denies.

10 39. In answer to paragraph 39 of Plaintiff's Complaint, Foremost is without sufficient
11 information to admit or deny and therefore denies.

12 40. In answer to paragraph 40 of Plaintiff's Complaint, Foremost denies each and every
13 allegation therein.

14 Breach of Contract

15 41. In answer to paragraph 41 of Plaintiff's Complaint, Foremost denies each and every
16 allegation contained therein.

17 Economic Damages

18 42. In answer to paragraph 42 of Plaintiff's Complaint, Foremost denies each and every
19 allegation contained therein.

20 Non-Economic Damages

21 43. In answer to paragraph 43 of Plaintiff's Complaint, Foremost denies each and every
22 allegation contained therein.

23 **SECOND CAUSE OF ACTION**

1 Repeated Allegations

2 44. In answer to paragraph 44 of Plaintiff's Complaint, Foremost incorporates by
3 reference its responses set forth above in paragraphs 1- 40.

4 Unfair or Deceptive Trade Practice

5 45. In answer to paragraph 45 of Plaintiff's Complaint, Foremost denies each and every
6 allegation contained therein.

7 Violation of Washington Insurance Regulations

8 46. In answer to paragraph 46 of Plaintiff's Complaint, Foremost denies each and every
9 allegation contained therein.

10 Unreasonable Denial of Claims

11 47. In answer to paragraph 47 of Plaintiff's Complaint, Foremost denies each and every
12 allegation contained therein.

13 Damages

14 48. In answer to paragraph 48 of Plaintiff's Complaint, Foremost denies that the
15 Plaintiff is entitled to the relief requested.

16 **THIRD CAUSE OF ACTION**

17 Repeated Allegations

18 49. In answer to paragraph 49 of Plaintiff's Complaint, Foremost incorporates by
19 reference its responses set forth above in paragraphs 1 – 40.

20 Unreasonable Denial of Plaintiff's Claims

21 50. In answer to paragraph 50 of Plaintiff's Complaint, Foremost denies that the
22 Plaintiff is entitled to the relief requested.

1 51. In answer to paragraph 51 of Plaintiff's Complaint, Foremost denies that the
2 Plaintiff is entitled to the relief requested.

3 Bad Faith

4 52. In answer to paragraph 52 of Plaintiff's Complaint, Foremost denies that the
5 Plaintiff is entitled to the relief requested.

6 Violations of Washington Law

7 53. In answer to paragraph 53 of Plaintiff's Complaint, Foremost denies that the
8 Plaintiff is entitled to the relief requested.

9 Damages / Economic Harm / Proximate Cause

10 54. In answer to paragraph 54 of Plaintiff's Complaint, Foremost denies that the
11 Plaintiff is entitled to the relief requested.

12 Non-economic Damages / Proximate Cause

13 55. In answer to paragraph 55 of Plaintiff's Complaint, Foremost denies that the
14 Plaintiff is entitled to the relief requested.

15
16 **AFFIRMATIVE DEFENSES**

17 WHEREFORE, having answered Plaintiff's Complaint, Foremost asserts the following
18 affirmative defenses:

19 1. Foremost has fully complied with its obligations under the policy of insurance
20 issued to Plaintiff and has at all times acted reasonably in handling Plaintiff's claim for
21 coverage. As a result, Plaintiff's extra-contractual claims are without merit.

22 2. The Complaint fails to state a claim against Foremost upon which relief may be
23 granted.

1 3. Plaintiff's damages, if any, are not proximately caused by any act or omission of
2 Foremost.

3 4. Plaintiff's injuries, if any, are proximately caused by Plaintiff's own acts or
4 omissions.

5 5. The Plaintiff's damages, if any, were caused or contributed to by third parties to
6 this litigation.

7 6. The Plaintiff did not suffer any damages as a direct or proximate result of any
8 act or omission by Foremost.

9 7. To the extent the Plaintiff is entitled to any recovery, Plaintiff's claims are
10 barred in whole or in part by the doctrines of offset and/or set-off.

11 8. To the extent the Plaintiff has suffered damages, Plaintiff failed to mitigate those
12 damages.

13 9. Foremost has not breached any contract between Foremost and Plaintiff.

14 10. The policy of insurance issued by Foremost provided coverage pursuant to its
15 terms and conditions of the policy. Plaintiff's claims are barred in whole or in part, by the terms
16 and conditions of the policy.

17 11. The Plaintiff is not entitled to the recovery of attorney fees.

18 12. Foremost is entitled to reimbursement of any and all amounts paid to Plaintiff
19 with regard to the subject matter.

20 13. Plaintiff has failed to establish the necessary elements of her claims.

21 14. Plaintiff has violated the terms of an agreed upon settlement protocol.

22 15. Plaintiff's claims are barred in whole or in part by the following policy
23 conditions:

1 We do not insure loss caused directly or indirectly by any of the
2 following.

- 3 1. Loss intentionally caused by any of you or performed at any of
4 your direction.

5 Form 4075 01/07 P 8

6 . . .

7 **3. Concealment or Fraud.** The entire policy will be void if any of
8 you:

9 **a.** Intentionally conceal or misrepresent any material fact or
10 circumstance; or

11 **b.** Engage in fraudulent conduct;

12 **c.** Make false statements with the intent to deceive; whether before
13 or after a loss or claim relating to this insurance.

14 Form 4075 01/07 P17

15 16. Foremost reserves the right to amend the pleadings in this matter to include any
16 additional claims or defenses as may become known or apparent during the course of this
17 litigation.

18 **RESERVATION**

19 1. Foremost reserves the right to amend its answer to add affirmative defenses,
20 counterclaims, cross-claims, or to institute third party actions, as additional facts are obtained
21 through discovery and investigation.

22 2. By including certain defenses as set forth above, Foremost does not concede that is
23 has assumed any applicable burden of proof.

COUNTERCLAIM

A. PARTIES

1 1. Foremost Insurance Company Grand Rapids, Michigan (“Foremost”) is a foreign
2 insurance company incorporated in the State of Michigan and licensed to conduct business in
3 the State of Washington.

4 2. Judi Nikon-Orcutt is an individual residing in Whatcom County, Washington.

5 **B. JURISDICTION AND VENUE**

6 3. Foremost incorporates by reference the allegations contained in paragraphs 1-2 as if
7 fully set forth herein.

8 4. The amount in controversy exceeds the jurisdictional minimum of \$75,000.00 for
9 diversity jurisdiction. Accordingly, this Court has jurisdiction over the subject matter of this
10 Counterclaim and over the parties hereto.

11 5. Plaintiff Judi Nikon-Orcutt, resides in Whatcom County, Washington. Foremost is a
12 foreign insurance company organized under the laws of the State of Michigan and licensed to
13 conduct business in the State of Washington. As a result, all parties are citizens of different
14 states and venue is properly before this Court.

15 **C. FACTS**

16 **Background Facts**

17 6. Foremost incorporates by reference the allegations contained in paragraphs 1-5 as if
18 fully set forth herein.

19 7. This matter arises out of a fire which occurred at the Plaintiff’s manufactured home
20 on or about November 11, 2013.

21 8. After the fire, the Plaintiff tendered a claim for property damage and damage to
22 personal property as a result of the fire.

23 **The Foremost Policy**

1 9. Foremost issued Policy No. 103-0685059723 for policy period of December 28,
2 2012, through December 28, 2013, to Judi Nikon-Orcutt. The Policy provided coverage
3 pursuant to its terms and conditions and not otherwise.

4 10. The Policy, attached as **Exhibit 1**, provides the following:

5 **Section I – Exclusions**

6 We do not insure loss caused directly or indirectly by any of the
7 following.

- 8 2. Loss intentionally caused by any of you or performed at any of
your direction.

9 Form 4075 01/07 P 8

10 11. In addition to the above, the Policy also provides the following provision:

11 **3. Concealment or Fraud.** The entire policy will be void if any of
12 you:

13 **a.** Intentionally conceal or misrepresent any material fact or
circumstance; or

14 **b.** Engage in fraudulent conduct;

15 **c.** Make false statements with the intent to deceive; whether before
or after a loss or claim relating to this insurance.

16 Form 4075 01/07 P17

17 **Foremost's Investigation**

18 12. Immediately after notification of the loss, Foremost begun its investigation with
19 regard to the loss.

20 13. To assist Foremost in its investigation of the loss, Foremost retained Q Global, a
21 forensic fire origin & cause determination expert to determine the origin and cause of the fire.

22 14. Based on Q Global's report, there was no reasonable accidental source of ignition
23 could be found. Q Global also determined that the fire may have been incendiary in origin.

1 15. Based on Foremost's investigation, Foremost determined that there was evidence of
 2 an intentionally set fire, the Plaintiff had a motive to set the fire, and the Plaintiff had the
 3 opportunity to set the fire. Accordingly, Foremost determined that there was no coverage for
 4 the loss.

5 16. Regardless, as a matter of good faith and fair dealing, Foremost fully extended
 6 coverage for the fire loss pursuant to the terms and conditions of the policy and not otherwise.
 7 Specifically, Foremost extended the full limit of the following coverages:

8 Coverage A - Dwelling: \$98,033.00.

9 Coverage C - Personal Property: \$49,016.00

10 Coverage D - Additional Living Expense: \$19,607.00

11 17. In addition to the above amounts, Foremost extended coverage for the additional
 12 extended replacement cost coverage in the policy. Additionally, Foremost extended the time
 13 period to replace the dwelling with one of like kind and quality and submit a claim for
 14 reimbursement an additional 120 days.

15 18. Foremost also extended coverage for debris removal up to the policy limit of
 16 \$5,000.00. Foremost would pay for debris removal coverage to the extent that it was incurred
 17 pursuant to the terms and conditions of the policy.

18 19. Foremost also extended coverage for the deck attached to the Plaintiff's
 19 manufactured home under the Coverage A – Dwelling policy provision.

20 20. Foremost has fully complied with the terms of the policy and has acted reasonably
 21 with regard to Plaintiff's claims at all times.

22 21. In spite of Foremost's determination that there is no coverage for the subject loss,
 23 Foremost, as a matter of good faith and fair dealing, fully extended coverage for this loss.

D. CAUSE OF ACTION – DECLARATORY RELIEF

22. Foremost incorporates by reference as though fully set forth herein, and restates and realleges each of the paragraphs 1 through 21 above.

23. Foremost is entitled to Declaratory Judgment in its favor, specifically including a judicial determination that it does not owe any coverage obligations to Plaintiff under the policy of insurance issued by Foremost to Plaintiff.

24. Foremost is entitled to Declaratory Judgment in its favor, that to the extent Foremost had a coverage obligation to Plaintiff, Foremost fully satisfied its coverage obligations and does not owe any additional amounts under the Foremost Policy.

E. CAUSE OF ACTION – BREACH OF CONTRACT

25. Foremost incorporates by reference as though fully set forth herein, and restates and realleges each of the paragraphs 1 through 21 above.

26. Plaintiff materially breached the terms and conditions of the Foremost policy.

27. As a result of the Plaintiff's breach of contract, Foremost does not owe any coverage obligations to Plaintiff under the policy issued by Foremost.

PRAYER

WHEREFORE, having fully answered the Complaint and alleged affirmative defenses and a counterclaim, Foremost prays for the following relief:

5.1 Dismissal of the Plaintiffs' Complaint with prejudice;

5.2 For judgment declaring that Plaintiff is not entitled to coverage under the Policy issued by Foremost.

5.3 For recovery of Foremost's costs and disbursements.

5.4 For such other further relief the Court may deem just and proper.

DATED this 18th day of August, 2015.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

LEATHER & ASSOCIATES, PLLC

/s/ Thomas Lether

Thomas Lether, WSBA #18089

1848 Westlake Avenue N, Suite 100

Seattle, WA 98109

P: (206) 467-5444/F: (206) 467-5544

tlether@letherlaw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Jeffrey Thigpen
1811 C Street
Bellingham, WA 98225

By: ☒ **ECF Notification** ☐ **E-mail** ☐ **Legal Messenger**

Dated this 18th day of August, 2015, at Seattle, Washington.

/s/ Nicholas McMurray
Nicholas McMurray, Paralegal